

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 14, 2006 Session

**WADE D. HARLEY, ET AL. v. BARRY HARRISON**

**Appeal from the Chancery Court for Williamson County  
No. 23681 Russ Heldman, Chancellor**

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**No. M2005-02099-COA-R3-CV - Filed on September 13, 2006**

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This is a breach of contract case regarding a dispute that has been on-going since 1995. On August 30, 1994, the plaintiffs contracted with the defendant for the construction of a new home, to be built around an existing nineteenth century house which was to be partially dismantled and utilized in the construction. After many months of construction, the plaintiffs terminated the contract and filed a complaint which sought, among other relief, a writ of possession for various “house parts” of the nineteenth century home which the defendant was wrongfully withholding and for which he had filed a Mechanics’ and Materialmen’s Lien. The defendant answered, filed a counter claim and eventually amended the Lien to increase the amount. On August 8, 2005, the trial court entered judgment ordering the removal of the defendant’s lien and awarding plaintiffs \$149,337.00. The defendant appeals. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and ROBERT W. WEDEMEYER, SP. J., joined.

Laurence Anthony Deas, Madison, Tennessee, attorney for Appellant, Barry Harrison.

Joel M. Leeman and Mary Beth Hagan, Nashville, Tennessee, attorneys for Appellee, Wade D. Harley and Delores L. Harley.

**OPINION**

On August 30, 1994, the parties entered into a contract whereby Defendant Barry Harrison [hereinafter “Appellant”] would relocate an 1880 residential structure from Lewisburg Pike to a lot owned by Wade D. Harley and wife, Delores L. Harley [hereinafter collectively “Appellee”], located at 1176 Manley Lane in Brentwood. The old structure on Lewisburg Pike was owned by Appellant. In addition to relocating the old home, Appellant was to add new construction to the rear of the old home, build a garage and improve the home in accordance with various plans and specifications. Appellant was to perform all the work and provide the materials for a fixed price of \$311,400.00.

Appellee relied upon the expertise of Appellant who represented that he was experienced in the relocation and construction of “historic buildings.” As a result of this reliance, Appellee did not retain any professionals for assistance and there were no inspections during the course of the construction except the ones performed at the direction of the construction lender, Leader Federal Savings and Loan, for the determination of draws on the construction loan obtained by Appellee.

Prior to the commencement of construction, both parties agreed that Appellant would be paid \$31,000.00 at the closing of Appellee’s construction loan. The parties later disagreed on whether this payment was for the “house parts” from the old construction or a 10 percent down payment due the Appellant. Construction began in November 1994 and, although the contract did not contain a completion date, Appellant advised Appellee that he would complete construction within six to seven months.

Problems became apparent after construction began. The house was to be constructed on a sloping lot. Appellee inquired of Appellant if moving the location of the house twenty feet to the east would create problems and Appellant advised that this move would not create any difficulty. After the foundation was laid, Appellee discovered that the ground floor of the house was thirteen feet above ground level and fill dirt would be needed to remedy the situation. The back porch fell in. The porch was repaired, and it collapsed again. After the garage doors had been framed, it was determined that the doors were different from the specifications. The exterior painting, priming and siding were areas of disagreement that were brought to the attention of the Appellant. The siding was warped and split in places. Appellant substituted materials that were different from the specifications, without the knowledge and consent of Appellee.<sup>1</sup> Appellee would regularly visit the construction site and on numerous days there was no activity. Delays in construction were pointed out to the Appellant.

On or about June 20, 1995, the parties met in an effort to fix a schedule for the completion of the house. After that meeting, there was little or no activity on the construction site. In July 1995, Appellee advised Appellant that the contract was terminated.

Shortly after termination, Appellant removed from Appellee’s property various “house parts” from the old Lewisburg Pike home which had not yet been used in the construction. The Appellees, through their attorney, wrote Appellant on August 3, 1995, confirming the termination and demanding the return of the “house parts.” Appellant replied on or about August 18, 1995 advising that the parties settle their differences and extended the date for final disposition until August 21, 1995. Appellant advised that after that date he would seek civil action and the “old part’s” would no longer be available. Appellee again advised Appellant of the need for those house parts but received no reply.

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<sup>1</sup> After Appellant’s termination it would be discovered, among other things, that the risers on the back stairs were not constructed properly, there were code issues about the mantles fitting the fire boxes, problems with the hardwood floors and the foundation. Eventually, it would also be determined that the electrical wiring was a mess and had to be redone.

In order to complete construction and remedy existing deficiencies, Appellee retained Hunter Jackson [hereinafter “Jackson”], a licensed general contractor. Jackson was unwilling to agree to a fixed price contract because of the partially completed nature of the project. Eventually, Appellee and Jackson agreed that he would complete the work and be compensated based on actual documented costs plus 20 percent. There were also overhead costs of \$5,000.00. For his work, Jackson was paid a total of \$245,554.39 by the Appellee. Approximately \$25,000.00 of this sum was for additional work not within the scope of Appellant’s contract.

A bench trial was conducted on November 6-7, 2003 and concluded on February 17, 2005. On July 19, 2005, the trial court entered findings of facts and conclusions of law awarding judgment for the Appellee for \$149,337.00 and ordered the removal of Appellant’s lien.

### Issues on Appeal

Appellant appeals and presents for review Appellee’s entitlement to damages, asserting that the contract was terminated without notice of complaints or opportunity to cure; that proof of damages was at best speculative; and that Appellee decided to sell the house in which they resided, and is therefore responsible for any costs incurred are the result of the unilateral decision. In the alternative, he argues he is entitled to damages for components of the old house not incorporated into the construction at the time he was terminated; payment for work done at the time he was fired; compensation for loss of profits from premature termination of contract; and prejudgment interest on the value of parts and work for which he was not compensated.

### Standard of Review

In a non-jury case, we evaluate the trial court’s findings of fact *de novo* and afford those findings a presumption of correctness unless the preponderance of the evidence is otherwise. *See, Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997) (citing Tenn. R. App. P. 13(d)). In evaluating the trial court’s findings of fact in this case, we are mindful of the following:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See, State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See, Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary. *See, Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 316 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

*Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). We review a trial court's conclusions of law under a purely *de novo* standard of review affording no presumption of correctness to those findings. See, *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *Adams v. Dean Roofing Co. Inc.*, 715 S.W.2d 341, 343 (Tenn. Ct. App. 1986).

### Discussion

Appellant states that, assuming *arguendo* he had not performed in a workmanlike manner, he was fired without notice and thus Appellee cannot recover because he did not provide Appellant with notice of perceived defects and the opportunity to cure them.

It is implicit in the trial court's detailed findings of fact that the court accredited the Appellee and Appellee's witnesses against the testimony of Appellant. The trial court found that Appellee had communicated orally and in writing with Appellant regarding deviations from the plans and specifications, delays and quality issues. The parties even met in June to discuss delay's in the progress of construction. After this meeting, the Appellant failed to perform any meaningful work and, in fact, went on vacation. The trial court found that Appellant was terminated only after having been given repeated opportunities to address the legitimate concerns and had failed to do so.

In evaluating factual issues relating to the need for notice or any other dispute, the weight, faith and credit to be given to any witness' testimony lies with the trier of fact, and the credibility accorded by the trier of fact will be given great weight by the appellate court. *Greeter Construction v. Tice*, 11 S.W.3d 907, 910 (Tenn. Ct. App. 1999); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). After careful review of the record, we find the evidence does not preponderate against the trial court's finding that the Appellee was justified in terminating the contract with Appellant.

### Damages

The purpose of assessing damages in a breach of contract is to place the plaintiff, as nearly as possible in the same position he would have had if the contract had been performed. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 538 (Tenn. Ct. App. 2005). "The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its' equivalent." *Edenfield v. Woodland Manor Inc.*, 62 Tenn. App. 280, 462 S.W.2d 237 (Tenn. Ct. App. 1970). This is especially true when the structure involved is the owner's home. *Id.* When a contractor fails to perform a contract for construction or fails to complete the project, then the measure of damages sustained by the owner is the difference between the contract price and the cost of finishing the work according to the contract. *St. John v. Bratton*, 25 Tenn. App., 150 S.W.2d 727, 728 (1941).

The trial court found that Appellant breached the contract. In order to place the Appellee, "as nearly as possible in the same position he would have had if the contract had been performed," the trial court determined that the measure of damages would be the cost to complete the

construction as specified as well as the costs to repair any defects and awarded damages to Appellee in the amount of \$149,337.00. The trial court found that the total amount to have the contract completed and the deficient work remedied was \$225,000.00. The court had excluded from this figure \$25,000.00 that was for extra work. The contract price was \$311,400.00. The court found that Appellant had been paid \$222,889.00, as of the date of termination, leaving a balance of \$89,120.00 that Appellant would have been entitled to had he completed the contract. The trial court found that the damage incurred by Appellant's failure to construct the home as contracted was \$135,880.00, which is the difference between what it cost Appellee to have Appellant's contract performed properly, and the remaining amount Appellant would have been entitled to had he properly performed the contract himself.

In addition, the court awarded Appellee \$12,537.00 for the amount spent in order to rent a residence during the time period between the date of the sale of their prior home and the date they were able to move into their new home. Appellee was also awarded \$920.00 for a premium to remove the liens placed on the home by the Appellant so that they could close their loan for the new home. Appellant claims the damages are speculative and that Appellant is not responsible for the amount of damages awarded as a result of Appellee's rental of a residence while awaiting completion of the house.

The trial court found that, although the contract had no specific completion date, Appellant had advised Appellee that he would complete the construction within six to seven months. If this estimate had been fulfilled, the house would have been completed in June 1995. The house was not completed until April or May 1996.

The trial court found that Appellant breached the contract. The trial court's calculation of damages placed the Appellee in the same position that he would have been had Appellant fully performed. The trial court found that had Appellant completed the contract as initially contemplated by the parties, Appellee would not have had to incur the additional expense for rent and that the inclusion of the rent in damages awarded makes Appellee whole. We do not find that the evidence preponderates against the findings of the trial court.

The trial court further found that the "house parts" were a part of the overall contract between Appellant and Appellee. The court found no provision for an additional payment for the "house parts" and further found that they were clearly included in the total contract price of \$311,400.00. This finding is further accredited by the testimony of the closing officer from Leader Federal who testified that the \$31,000.00 paid to Appellant was for all the "house parts" from the old house at Lewisburg Pike. We find the evidence does not preponderate against the trial court's finding that the contested house parts were part of the fixed price contract and thus the property of Appellee.

### Conclusion

In conclusion, we find that Appellant breached his contract with Appellee. The breaches of Appellant's obligations were fundamental and required substantial remedial work in order to

complete the construction. Appellant was given notice of the defects and he failed to address them. Therefore, Appellee was justified in terminating the contract with Appellant. In awarding damages the trial court gave all due credits to Appellant for work performed and the remaining amounts due under the contract. The amount of damages awarded put Appellee in the position they would have been had Appellant performed the contract.

Accordingly, we affirm the judgment of the trial court. Costs will be assessed against the Appellant and his surety.

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JON KERRY BLACKWOOD, SENIOR JUDGE